

“Can a Pension Increase Policy Override the Rule which requires the Employer to Consent to a Pension Increase?”

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Pension Increase Policy

□ “Section 14B(3)–

- (a) The board shall establish and implement a policy with regard to increases to be granted to pensioners and deferred pensioners, which policy must –
 - (i) aim to award a percentage of the Consumer Price Index, or some other measure of price inflation which is deemed suitable by the board; and
 - (ii) set the frequency with which increases will be considered in line with the policy: provided that increases should be considered each year, with comparison to the minimum pension increase at least once every 3 years.
- (b) the policy contemplated in paragraph (a) must be communicated to pensioners and deferred pensioners when it is established and whenever it is changed.”

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The Fund must act in terms of its Rules

- ❑ Section 13

 - “**Binding Force of Rules**

 - Subject to the provisions of this Act, the rules of a registered fund shall be binding on the fund and the members, shareholders and officers thereof, and on any person who claims under the rules or whose claim is derived from a person so claiming.”

- ❑ “The rules amount to the fund’s constitution.”

 - Mostert NO v Old Mutual* (2001) 8 BPLR 2307 (A)

- ❑ “What the trustees may do with the fund’s assets is set forth in the rules. If what they propose to do (or have been ordered to do) is not within the powers conferred upon them by the rules, they may not do it.”

 - Tek Corp Provident Fund v Lorentz* (2000) 3 BPLR 227 (SCA)

The Employer

- ❑ In a DB fund with a balance of cost obligation the employer has an interest in a pension increase policy which requires an aggressive investment approach or which results in a high contribution rate.
- ❑ Pension promise originates with the employer.
- ❑ Reputational risk to the employer if the pension promise fails.

The Dilemma?

- ❑ Pension increase policy is subject to the rules, including any veto power of the employer.

OR

- ❑ The statutory pension increase policy obligation overrides what is in the rules...but then won't the employer be prejudiced?

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Understanding the Employer / Fund Relationship

- ❑ A relationship of reciprocal good faith.
(*Tek* case)
- ❑ Trustees may not abuse the balance of cost obligation.
- ❑ The responsibility for the investment of the fund assets lies with the trustees, not the employer.
- ❑ The pension increase policy is subject to affordability – why is a veto necessary?

Pension Increase Policy in the Context of the Surplus Provisions

- ❑ Pension increase policy must be understood in the context of the minimum pension increase.
- ❑ Section 14B(4) – methodology for calculating the minimum pension increase.
- ❑ One purpose of the pension increase policy is to ensure that there is no accumulation of surplus in the fund at the expense of inflationary increases for pensioners.
- ❑ Section 14B(3) is mandatory and there is no reference to it being subject to the provisions of the rules.